ARKANSAS SUPREME COURT

No. CR 05-895

NOT DESIGNATED FOR PUBLICATION

DARRELL W. PILCHER
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered **May 18, 2006**

PRO SE APPEAL FROM THE CIRCUIT COURT OF HOT SPRING COUNTY, CR-2000-269-1, HON. CHRIS E. WILLIAMS, JUDGE

AFFIRMED

PER CURIAM

Appellant Darrell W. Pilcher was convicted by a jury of capital murder and sentenced to life imprisonment without the possibility of parole. On appeal, we affirmed. *Pilcher v. State*, 355 Ark. 369, 136 S.W.3d 766 (2003). Subsequently, appellant, proceeding *pro se*, filed in the trial court a petition for postconviction relief pursuant to Ark. R. Crim. P. 37.1. After a hearing, the trial court denied the petition and appellant, through counsel, has lodged an appeal in this court from that order.

The victim, Carolyn Farley, and appellant had been romantically involved. After the victim ended the relationship, appellant kidnapped her while she was walking to work. Appellant blindfolded her, struck her on the head with an axe handle, tied her to a tree, and eventually released her. Appellant was arrested on charges of kidnapping and second-degree battery and later released on bond. Less than two weeks later, appellant again kidnapped the victim on her way to work. He stabbed the victim twenty-two times, tied cement blocks to her body, and then hid her body under plastic bags and tires on the bank of the Ouachita River. After being arrested on an unrelated matter, appellant confessed to the murder and led officers to the victim's body. During his jury trial,

appellant again admitted to committing the murder.

In the instant matter, appellant complains that trial counsel rendered ineffective assistance, that he was mentally incompetent to stand trial, and that the trial court erred in failing to suppress the statements appellant gave during questioning. We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous or clearly against the preponderance of the evidence. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there is evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002). We find no error and affirm the trial court.

As to his claim that his trial counsel rendered ineffective assistance, appellant's argument on appeal consists of a recitation of the standard related to ineffective assistance of counsel pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984). Appellant failed to include his original Rule 37.1 petition in his addendum, and the trial court's order denying appellant's petition on this point merely states that "no evidence was presented to show ineffective assistance of counsel." Appellant abstracted minute portions of testimony given at the Rule 37.1 hearing. However, no testimony supporting appellant's argument on appeal pertaining to the elements of ineffective assistance of counsel has been abstracted.

Assuming that appellant's claim of ineffective assistance relates to allegations of juror misconduct or appellant's mental evaluations, appellant's argument on appeal fails to set forth the facts necessary to show that trial counsel rendered ineffective assistance. Appellant must demonstrate that trial counsel's performance was deficient, and that the deficient performance prejudiced the defense. *Strickland*, *supra*; *Andrews v. State*, 344 Ark. 606, 42 S.W.3d 484 (2001)

(*per curiam*). The burden is on appellant to provide facts to support his claims of prejudice. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (*per curiam*). Allegations without factual substantiation are insufficient to overcome the presumption that counsel was effective. *Id.* Conclusory statements cannot be the basis of postconviction relief. *Jackson v. State,* 352 Ark. 359, 105 S.W.3d 352 (2003).

Here, appellant failed to properly bring up a record that establishes the factual basis with which this court can make a determination of whether appellant's argument has merit. The record fails to give this court a clear understanding of what occurred at the trial court level with regard to appellant's claims of ineffective assistance of counsel. The party asserting error has the burden to produce a record sufficient to demonstrate prejudicial error, and this court does not consider evidence not included in the record on appeal. *Smith v. State*, 343 Ark. 552, 39 S.W.3d 739 (2001) (citing *Coulter v. State*, 343 Ark. 22, 31 S.W.3d 826 (2000)). Similarly, appellant failed to provide this court an abstract sufficient to conduct a meaningful review of this matter.[1] *Campbell v. State*, 349 Ark. 111, 76 S.W.3d 271 (2002) (*per curiam*). Appellant failed to make a showing under *Strickland* that trial counsel rendered ineffective assistance and we affirm the trial court on this point.

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[1]For example, the abstracted testimony presumably showing ineffective assistance related to juror misconduct states in its entirety:

> [Direct Examination]
> By Mr. Garrett:
> Q. Mr. Pilcher, [what] was the name of the juror?
> A. It was a female. One of the females is all I know. It was the foreman on the jury.
> Q. Well, how do you know that she knew the victim, Mr. Pilcher?
> A. It was told by one of the other people.
> Q. Who?
> A. One of the inmates got a visit. His sister was sitting out there when I had my jury trial, and she come up there.

Next, appellant claims that he was mentally incompetent to stand trial. His addendum includes two mental evaluation reports dated August 6, 2001, and October 26, 2001. Appellant argues the reports ascertained that appellant was not fit to proceed to trial and that he "should have been sent to get help."

A defendant who did not raise the issue of incompetence at trial may nevertheless raise the issue in a petition for postconviction relief. *Henry v. State*, 288 Ark. 592, 708 S.W.2d 88 (1986) (*per curiam*). The reason for this rule is that "a person who is incompetent cannot knowingly and intelligently waive his right to have the court determine his capacity to stand trial." *Id.* at 593-94, 708 S.W.2d at 89 (citing *Pate v. Robinson*, 383 U.S. 375 (1966)). However, a petitioner who asserts his incompetence for the first time in a petition for postconviction relief has the heavy burden of demonstrating with facts that he was not competent at the time of trial. *Matthews v. State*, 332 Ark. 661, 966 S.W.2d 888 (1998) (*per curiam*) (citing *Henry*, *supra*).

Neither of the reports relied upon by appellant were included in the record on appeal lodged in this court in the instant case. The State maintains that inclusion of these reports in appellant's addendum violates Ark. Sup. Ct. R. 4-2(a)(8) and precludes consideration of the reports on appeal. However, the August 6, 2001, report is contained in the record of appellant's direct appeal to this court. The record lodged in appellant's direct appeal is a public record which need not be incorporated into the record on the second appeal which stems from the same judgment of conviction. *Johnson v. State*, 332 Ark. 182, 964 S.W.2d 199 (1998) (*per curiam*). We may go to the record to affirm. *See, e.g., Ferguson v. State*, 343 Ark. 159, 33 S.W.3d 115 (2000).

Here, appellant's characterization of the August 6, 2001, mental evaluation report is inaccurate and misleading, where, ultimately, the report concluded that appellant was competent to

stand trial.[2] The first report diagnosed appellant as malingering, and having alcohol dependence and antisocial personality traits. After being given the Georgia Court Competency Test (GCCT), the psychologist made the following finding: "His score on the GGCT [sic] was 58 out of 100, which would normally be associated with lack of fitness to proceed. *In light of his evident malingering, however, I would find no convincing evidence that he lacks the knowledge or capacities relevant to competence to stand trial*." (Emphasis supplied.) Appellant failed to include the second sentence of this diagnosis in his argument to this court. The psychologist found a number of instances where appellant feigned ignorance or gave incorrect answers on tests, presumably to yield test results favorable to a claim of mental incompetence when none existed.

Accordingly, appellant failed to produce any evidence that he was mentally incompetent to stand trial. We find no error and affirm the trial court on this point.

Appellant's third point on appeal concerns the statements given to police while in custody and his motion to suppress those statements. Appellant previously raised this issue on direct appeal to this court. We found that the trial court did not err in finding that appellant voluntarily gave those statements to law enforcement officers. *Pilcher*, *supra*.

Rule 37.1 does not provide a remedy when an issue could have been raised in the trial or argued on appeal. *See, e.g.*, *Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001) (citing *Davis v. State*, 345 Ark. 161, 44 S.W.3d 726 (2001)). Further, as to issues that have been previously decided on appeal, Rule 37.1 does not provide a means to reassert an issue decided on appeal.

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[2]Although not considered in this appeal, we note that appellant also mischaracterized the finding contained in the October 26, 2001, report. Therein, the psychologist found that in spite of appellant's mild mental retardation, he was "able to appreciate the criminality of the alleged offense and was able to conform his conduct to the requirements of the law at the time of the alleged offense." The second examiner therefore found appellant competent to stand trial.

Camargo v. State, 337 Ark. 105, 987 S.W.2d 680 (1999).

The trial court held that the admissibility of appellant's confession was addressed on direct appeal and is therefore not cognizable in a Rule 37.1 petition. We find no error and affirm.

Affirmed.